

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

1998 Biennial Regulatory Review --)
Review of the International Settlements)
Policy and Associated Filing Requirements)

IB Docket No. 98-148

Regulation of International)
Accounting Rates)

CC Docket No. 90-337

COMMENTS OF
MCI WORLDCOM, INC.

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SUMMARY

MCI WorldCom supports the Commission's efforts to update its rules regarding the application of the ISP. MCI WorldCom urges the Commission to adopt its proposals, with the modifications recommended in these comments.

MCI WorldCom believes that arrangements between U.S. carriers and foreign carriers that lack market power should not be subject to the ISP or any filing requirements under Sections 43.51 and 64.1001. Foreign carriers with less than 50 percent market share in a relevant destination market lack sufficient market power to affect competition adversely in the United States.

With respect to any arrangements between U.S. carriers and dominant foreign carriers from WTO Member countries, the ISP should apply unless: (1) at least 50 percent of the traffic on the route is settled within 2 cents of the best practices rate (currently 8 cents); *or* the foreign destination market affords U.S. carriers equivalent opportunities to provide ISR. When either of these criteria is satisfied, the ISP should be removed with respect to any arrangement on the route with any dominant foreign carrier.

The Commission should retain its Flexibility Policy for arrangements with dominant carriers in cases where the criteria for ISP removal have not been satisfied. The ISP may be waived upon prior approval by the Commission, after public notice and comment. The U.S. carrier must demonstrate that the proposed arrangement serves the public interest. All arrangements with dominant carriers from non-WTO Member countries should remain subject to the ISP and prior approval process for waivers of the ISP.

When the ISP is removed or waived, arrangements between U.S. carriers and

dominant foreign carriers affecting more than 25 percent of the traffic should be filed confidentially with the Commission and should not contain unreasonably discriminatory terms and conditions. Arrangements between U.S. carriers and dominant foreign carrier affiliates and non-equity joint venture partners should be publicly filed with the Commission and should not contain unreasonably discriminatory terms and conditions.

The Commission should retain its "No Special Concessions" rule to the extent it prohibits exclusive arrangements with a foreign carrier with market power with respect to the interconnection of international facilities, private line provisioning and maintenance, and quality of services. In addition, grooming arrangements between foreign carriers with market power and U.S. incumbent local exchange carriers should be prohibited.

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COMMENTS OF MCI WORLDCOM, INC.

MCI WorldCom, Inc. ("MCI WorldCom") hereby submits its comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-captioned proceedings. In its *Notice*, the Commission proposes numerous changes to its rules regarding the application of the International Settlements Policy ("ISP").

MCI WorldCom supports the Commission's goal of bringing the rates for terminating international calls as close as possible to cost and fostering innovation in the provision of international telecommunications services for U.S. carriers and consumers.¹ With growing competition in many foreign destination markets and a world-wide downward trend in international settlement rates, it is timely for the Commission to review its rules and adjust them accordingly. However, the Commission must recognize that, on routes where there is a lack of competition in the foreign destination market or cost-based settlement rates have not yet been implemented, removing the ISP would significantly increase the risk of harm in the

¹ See *Notice* at ¶ 5.

U.S. market. The ISP -- which safeguards against whipsawing and discrimination, and reduces the incentive for one-way bypass into the United States -- remains essential on such routes. MCI WorldCom thus encourages the Commission to adopt its proposals, with certain modifications proposed in these comments.

A. *Application of the ISP to Arrangements With Foreign Carriers That Lack Market Power*

In its *Notice*, the Commission tentatively concludes that it should not continue to apply the ISP and related filing requirements to U.S. carrier arrangements with foreign carriers (from WTO Member countries) that lack market power in the relevant foreign destination market.² MCI WorldCom strongly supports this tentative conclusion. As the Commission recognizes, foreign carriers that lack market power in the foreign destination market also lack the ability to engage in "whipsawing" or other anticompetitive conduct. By contrast, arrangements between U.S. carriers and foreign carriers that possess market power raise competitive concerns that warrant scrutiny by the Commission.

The Commission also tentatively concludes that it should exempt U.S. carriers from filing contracts and accounting rate information under Sections 43.51 and 64.1001 of the Commission's rules for arrangements with foreign carriers that lack market power in WTO Member countries. MCI WorldCom supports this conclusion. MCI WorldCom agrees with the Commission that there is little reason to maintain a filing requirement for arrangements between carriers that lack market power.

The Commission seeks comment on the standard it should use to determine whether a

² See *id.* at ¶ 18.

foreign carrier lacks market power in a relevant foreign destination market. The Commission proposes to apply a presumption that a foreign carrier with less than 50 percent market share in a relevant destination market lacks sufficient market power to affect competition adversely in the United States. MCI WorldCom supports this approach.³

MCI WorldCom also believes that the Commission should apply the same approach to arrangements between U.S. carriers and carriers that lack market power in non-WTO member countries. The same rationale applies, regardless of WTO member status: if a foreign carrier is nondominant in the relevant destination market, the removal of the ISP should not have anticompetitive effects. Thus, MCI WorldCom urges the Commission to apply the same standard to arrangements with nondominant carriers from non-WTO member countries as the Commission applies to nondominant carriers from WTO member countries.⁴

Finally, the Commission asks whether it should make an affirmative finding whether a

³ In addition, the Commission should reiterate that this standard applies to any foreign carrier which has the ability to terminate or originate international services in a relevant foreign destination market. "Foreign carrier" is defined under the Commission's rules to include "entities authorized to engage in the provision of domestic telecommunications services if such carriers have the ability to originate or terminate telecommunications services to or from points outside their country." See 47 Section 63.18(h)(1)(ii). Thus, a foreign carrier that controls a majority of local, inter-city, or international termination or origination services necessary to originate or terminate international calls would be excluded from such blanket liberalization. As the Commission has previously recognized, a foreign carrier that possesses market power in the provision of local or long distance services alone possesses the ability to leverage that market power anticompetitively. See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891, 23,952-53 (1997) ("*Foreign Participation Order*").

⁴ MCI WorldCom supports the Commission's tentative conclusion to apply its current ISP rules to dominant foreign carriers from non-WTO Member countries. See *Notice* at ¶ 17. In such cases, it is unlikely that there will be competitive or regulatory constraints on the exercise of market power by the dominant foreign carrier.

foreign carrier lacks market power.⁵ As a general matter, MCI WorldCom does not believe an affirmative finding is necessary. In most cases, there should be no ambiguity regarding whether a foreign carrier meets the 50 percent market share threshold. In any event, if there is ambiguity about the foreign carrier's market share or if that market share exceeds 50 percent, a U.S. carrier may seek a declaratory ruling from the Commission that a particular foreign carrier lacks market power.

B. *Application of the ISP and Related Filing Requirements to Arrangements With Foreign Carriers in Liberalized Markets*

The Commission requests comment on whether it should decline in certain circumstances to apply the ISP and related filing requirements to U.S. carriers' arrangements with *all* foreign carriers in selected WTO Member countries, including arrangements with carriers that possess market power.⁶ The Commission also seeks comment on the standard it should employ to identify routes on which it should not apply the ISP. It proposes to lift the ISP requirements for U.S. carriers' arrangements with all foreign carriers in markets that are sufficiently liberalized, and markets with sufficiently low settlement rates.⁷

MCI WorldCom supports the Commission's efforts to identify routes for which the ISP may be lifted with respect to arrangements with *all* foreign carriers. MCI WorldCom believes that it is appropriate to lift the ISP when competitive conditions exist in the relevant foreign market or cost-based settlement rates exist so as to ensure that there is little potential

⁵ See *id.* at ¶ 22.

⁶ See *id.* at ¶ 25.

⁷ See *id.* at ¶ 25.

for one-way bypass that will increase net U.S. settlement rates.

The Commission suggests that one possible approach would be to decline to apply the ISP with respect to all foreign carriers on routes where the Commission has already authorized International Simple Resale ("ISR"). Under the Commission's current rules, ISR will be authorized for a particular route where the destination country is found by the Commission to offer equivalent resale opportunities, or where 50 percent of the traffic on the route is settled at or below benchmark rates.

MCI WorldCom believes that the use of the current ISR standard as the standard for removal of the ISP for a particular route is inappropriate and will result in significantly increased one-way bypass. As the Commission has repeatedly recognized, the settlement rate benchmarks are well above the true cost of terminating international traffic.⁸ Thus, if the ISP is lifted on a particular route when the benchmark is reached, the dominant foreign carrier would find it highly profitable to engage in one-way bypass, with no resulting downward pressure on settlement rates.

In addition, eliminating the ISP in such cases would effectively nullify the Commission's current safeguard against one-way bypass for ISR routes. In the *Foreign Participation Order*, the Commission was concerned about the potential for one-way bypass for countries that become authorized for ISR by meeting the relevant settlement rate benchmark. As a result, the Commission declared that it would impose sanctions if one-way

⁸ See, e.g., *International Settlement Rates*, Report and Order, 12 FCC Rcd 19806, 19807 (1997), ("*Benchmarks Order*") recon. pending, appeal filed; *Cable & Wireless et al. v. FCC*, No. 97-1612 (D.C. Dir. filed Sept. 26, 1997).

bypass occurs on a particular ISR route.⁹ One-way bypass was presumed to occur when the percentage of outbound traffic relative to inbound traffic increases by more than 10 percent. Sanctions include prohibiting carriers from providing switched services via private lines until settlement rates for at least 50 percent of the U.S.-billed traffic on the route is settled at or below the best practice rate (\$0.08).

However, eliminating the ISP for countries that meet the benchmark would effectively nullify this safeguard, which has a significant deterrent effect. Thus, there would be no protection against one-way bypass if the Commission permits the ISP to be removed when the settlement rate benchmark is met and ISR is approved.

Instead, MCI WorldCom supports the elimination of the ISP to arrangements with *all* foreign carriers on WTO Member country routes in which: (1) at least 50 percent of the traffic on the route is settled within 2 cents of the best practices rate,¹⁰ or (2) the foreign market affords U.S. carriers equivalent ISR opportunities.

This standard will permit maximum flexibility, and put further downward pressure on settlement rates, while ensuring that there is minimal incentive or opportunity for in-bound bypass. The use of a rate within 2 cents of the best practices rate will significantly reduce the incentive for one-way bypass. Similarly, if U.S. carriers have equivalent opportunities to provide ISR in the relevant foreign market, U.S. carriers will be able to bypass high settlement rates for terminating their own traffic in the foreign market, thereby eliminating

⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23,927-28.

¹⁰ The current best practices rate, adopted in August 1997, is \$0.08 a minute. See *Benchmarks Order*, 12 FCC Rcd at 19,870-71. The Commission should update the best practices rate in this proceeding, and annually thereafter.

the one-way bypass problem. The Commission thus should remove the ISP for all carriers only on routes where the settlement rate is near cost or U.S. carriers have equivalent ISR opportunities on the foreign end.

On routes where the ISP is removed entirely, MCI WorldCom believes that, with respect to arrangements involving dominant foreign carriers, the Commission should retain a modified version of its publication and nondiscrimination safeguards that currently apply under the Commission's Flexibility Policy. Currently, there are two safeguards broadly imposed on arrangements between carriers regardless of whether there is a dominant foreign carrier involved. First, any alternative arrangement affecting more than 25 percent of the outbound or inbound traffic on a route may not contain unreasonably discriminatory terms and conditions and must be publicly filed. Second, all alternative arrangements between affiliated carriers and carriers involved in non-equity joint ventures must be publicly filed.¹¹ MCI WorldCom urges the Commission to retain these safeguards in a modified form.

First, the Commission should require that arrangements with dominant foreign carriers affecting more than 25 percent of the outbound or inbound traffic on a route be filed confidentially with the Commission and not contain unreasonably discriminatory terms and conditions. This level is the same as the current requirement and ensures that the Commission has oversight of arrangements that may have a distorting affect on competition on a particular route, but also allows carriers flexibility to negotiate arrangements that result in lower termination rates for international services.

¹¹ See *Regulation of International Accounting Rates*, Fourth Report and Order, 11 FCC Rcd 20,063, 20,078-84 (1996) ("*Flexibility Order*").

Second, MCI WorldCom urges the Commission to continue to require that arrangements between dominant foreign carriers and affiliates or non-equity joint venture partners be publicly filed and not contain any unreasonably discriminatory terms or conditions. Such arrangements raise the possibility of anticompetitive conduct.¹²

C. *Revisions to the Flexibility Policy*

The Commission seeks comment on whether it should maintain or modify the two safeguards adopted in its Flexibility Order, to the extent the ISP remains in place. MCI WorldCom agrees with the Commission that its Flexibility Policy will be largely superseded if the Commission modifies the ISP rules. However, MCI WorldCom recognizes that there may be unique, unforeseen circumstances where the public interest would be served by allowing waiver of the ISP for a particular arrangement even though the standard for removing the ISP has not been met. MCI WorldCom thus believes that the Commission should retain its current prior approval process and safeguards for arrangements with dominant foreign carriers on routes where the ISP has not been removed.

D. *Revisions to ISR Rules*

The Commission seeks comment on whether it should modify its ISR rules as a mechanism for putting greater pressure on settlement rates. The Commission's current ISR rules permit carriers to engage in ISR only on routes to WTO Member countries where 50 percent of the traffic is settled at benchmark rates *or* where the foreign market offers

¹² By contrast, arrangements between affiliates which lack market power are unlikely to have an adverse impact on competition on a particular route and, indeed, are likely to promote competition. Thus, the Commission should encourage such arrangements, rather than inhibiting them by requiring prior approval and publication.

equivalent resale opportunities. Specifically, the Commission asks whether, consistent with its commitment to prevent one-way bypass, it should permit carriers to provide ISR for a limited amount of traffic on a route. The Commission also asks whether it would be feasible to decide in advance to lift the ISP for *all* routes when a certain percentage of international routes have become competitive.

MCI WorldCom supports the Commission's goal of encouraging ISR to put downward pressure on international settlement rates. However, MCI WorldCom strongly opposes any changes to the Commission's current ISR rules. The current ISR rules have been carefully crafted to prevent one-way bypass, while putting downward pressure on settlement rates. Allowing ISR on routes that do not meet the settlement rate benchmark or meet the equivalency test would *not* put downward pressure on settlement rates. Indeed, it would almost certainly result in significantly increased one-way bypass with little or no offsetting decrease in settlement rates, contrary to the Commission's goals of reducing international termination rates and consumer prices. An *ex post facto* safeguard designed to detect and sanction market distortion resulting from one-way bypass will not be adequate to prevent the likely harmful consequences that would follow from wholesale one-way bypass.

E. *Application of the "No Special Concessions" Rule and Other Safeguards*

The Commission requests comment on the extent to which its "No Special Concessions" rule and other safeguards would apply if the Commission removes the ISP. The Commission tentatively concludes that the "No Special Concessions" rule does not apply to the terms and conditions under which traffic is settled, including allocation of return traffic, by a U.S. carrier on an ISR route. The "No Special Concessions" rule would still

prohibit exclusive arrangements with a foreign carrier with market power with respect to the interconnection of international facilities, private line provisioning and maintenance, as well as quality of service. MCI WorldCom supports retention of these safeguards, which help to deter anticompetitive conduct by dominant foreign carriers, particularly those with U.S. affiliates.

As MCI WorldCom has indicated above, it believes that the ISP should be removed for all carriers on routes where the settlement rates are sufficiently low or U.S. carriers have equivalent ISR opportunities on the foreign end. To the extent the ISP is removed, however, MCI WorldCom supports the retention of the "No Special Concessions" rule as outlined by the Commission.

The Commission also requests comment on whether certain types of grooming arrangements present the potential for anticompetitive effects, particularly with respect to arrangements between foreign carriers with market power and incumbent local exchange carriers ("ILECs").¹³ MCI WorldCom believes that grooming arrangements between foreign carriers with market power and ILECs present the potential for anticompetitive harm and should be prohibited. Any perceived efficiency gains from such arrangements are very small, and the likely trickle down of these benefits to U.S. consumers are even smaller or nonexistent.¹⁴

¹³ See Notice at ¶ 43.

¹⁴ For a detailed summary of the potential harm that grooming may cause, see Letter from Kenneth A. Schagrin, MCI Communications Corporation, to Magalie Roman Salas, Federal Communications Commission, IB Docket No. 97-142 (July 20, 1998).

By virtue of its monopoly control over the local access and exchange markets, an ILEC has the ability to negotiate more favorable arrangements to terminate U.S. inbound international traffic with dominant foreign carriers. For example, an ILEC may seek to groom inbound traffic to increase its proportion of low cost traffic and decrease the proportion of high cost traffic it receives from a foreign correspondent. The ILEC may agree to receive a reduced settlement payment in exchange for an increase in the ratio of off-peak to peak traffic that it terminates. This type of arrangement may lower the ILEC's cost, but it does so at the expense of other U.S. carriers, which must carry a disproportionate share of the peak traffic, without receiving any increase in settlement payments. If grooming is allowed by an ILEC, it raises the potential for "whipsawing" by dominant foreign carriers. Therefore, the grooming arrangements between an ILEC and a dominant foreign carrier must be prohibited.

F. *Accounting Rate Filing Changes*

In its *Notice*, the Commission tentatively concludes that it should simplify its accounting rate filing procedures to remove the option of filing a notification, and to require that all accounting rate filings be governed under the existing procedures for accounting rate modifications.¹⁵ In addition, the Commission seeks comment on whether, in light of the detailed information regarding accounting rate filings that will be available on the Internet, the Commission can eliminate the requirement that copies of accounting rate filings be served on all carriers providing service on a particular route. MCI WorldCom supports these improvements in the accounting rate filing process, and encourages the Commission to

¹⁵ See *Notice* at ¶ 46.

update the information available on its Internet site in a timely manner.

G. *Summary of MCI WorldCom Proposed Approach*

MCI WorldCom urges the Commission to modify its rules as set forth in these comments, and suggests that the Commission restructure such modified rules as follows:

1. Arrangements With Nondominant Foreign Carriers

The ISP should not apply to arrangements between U.S. carriers and foreign carriers that lack market power. Such arrangements also should not be subject to any filing requirements under Sections 43.51 and 64.1001. A foreign carrier with less than 50 percent market share in a relevant destination market lacks sufficient market power to affect competition adversely in the United States. If the Commission adopts this approach, its Flexibility Policy and the "No Special Concessions" rule would be irrelevant to such arrangements.

2. Arrangements With Dominant Foreign Carriers

With respect to arrangements with dominant foreign carriers from WTO Member countries, the ISP should apply unless: (1) at least 50 percent of the traffic on the route is settled within 2 cents of the best practices rate; *or* the foreign destination market affords U.S. carriers equivalent ISR opportunities. When either of these criteria is satisfied, the ISP should be removed with respect to any arrangement on the route with any dominant foreign carrier.

The Commission should retain its Flexibility Policy for arrangements with dominant carriers in cases where the criteria for ISP removal has not been satisfied. The ISP may be waived upon prior approval by the Commission, after public notice and comment. The U.S.

carrier must demonstrate that the proposed arrangement serves the public interest. All arrangements with dominant carriers from non-WTO Member countries should be subject to the ISP and prior approval process for waivers of the ISP.

When the ISP is removed or waived, arrangements between U.S. carriers and dominant foreign carriers affecting more than 25 percent of the traffic should be filed confidentially with the Commission and should not contain unreasonably discriminatory terms and conditions. Arrangements between U.S. carriers and dominant foreign carrier affiliates and non-equity joint venture partners should be publicly filed with the Commission and should not contain unreasonably discriminatory terms and conditions.

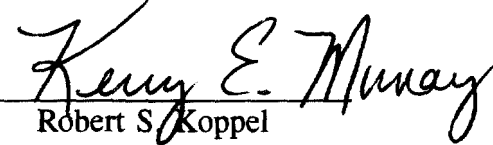
The Commission should retain its "No Special Concessions" rule to the extent it prohibits exclusive or discriminatory arrangements with a foreign carrier with market power with respect to the interconnection of international facilities, private line provisioning and maintenance, and quality of services. In addition, grooming arrangements between foreign carriers with market power and U.S. incumbent local exchange carriers should be prohibited.

H. *Conclusion*

In conclusion, MCI WorldCom supports the Commission's efforts to update its rules regarding the application of the ISP. MCI WorldCom urges the Commission to adopt its proposals, with the modifications recommended in these comments.

Respectfully submitted,

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September 16, 1998

CERTIFICATE OF SERVICE

I, Susanne Deljoubar, hereby certify that I have this 16th day of September, 1998, sent a copy of the foregoing "Comments" by first-class, U.S. mail, postage prepaid to the following:

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